Petition

81-1546

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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

STATE OF WASHINGTON,
Respondent,

v.

GERALD PAUL CLEPPE,
Petitioner.

STATE OF WASHINGTON,
Respondent,

v.

VELMA J. SYKES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED FOR REVIEW

The Washington Supreme Court held that a defendant could be found guilty of the felony of possession of a controlled substance solely upon proof that the substance was physically located within the defendant's place of business. The court held that the State did not have to prove that the defendant intended to possess or was even aware that he or she possessed the substance. According to the court, the defendant had the burden of establishing his or her innocence by disproving the only mental state relevant to the crime, i.e., the defendant's awareness of the existence of the controlled substances. The questions presented are:

1. Is a defendant denied due process of law by a requirement that the defendant disprove the only mental state relevant to the crime?

2. Is a defendant denied due process of law when the defendant is subject to imprisonment without any requirement that a culpable mental state accompany the defendant's conduct?

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The opinion of the Supreme Court of Washington is reported at 96 Wn.2d 373, 635 P.2d 435 (1981), and is reproduced in Appendix A.

JURISDICTION

The opinion of the Washington Supreme Court was filed on October 29, 1981.

Petitioner filed a timely motion for reconsideration on November 18, 1981. See Washington Rule of Appellate Procedure (RAP) 12.4(b). The motion for reconsideration was denied on December 17, 1981. (Appendix D) The sixtieth day after December 17 is February 15, 1982, a federal legal holiday. This Petition for Certiorari is mailed to the court on the following day, February 16, 1982. U. S. Sup. Ct. Rule 28.2.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or amenities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code § 69.50.401(d):

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined for not more than $10,000, or both, except as provided for in subsection (e) of this section. [Subsection (e), not relevant here,

provides that possession of 40 grams or less of marihuana is a misdemeanor.]

STATEMENT OF THE CASE

A. Proceedings In State Court

Defendant Gerald Paul Cleppe was charged with three counts of possession of controlled substances in violation of Washington's version of the Uniform Controlled Substances Act, Wash. Rev. Code 69.50.401(c) (now codified as 69.50.401(d)). Only Count I is relevant to this petition, as the convictions on Counts II and III were reversed by the Supreme Court on grounds not relevant to this petition.

Mr. Cleppe was tried before a jury. Mr. Cleppe's counsel asked the court to instruct the jury that the crime of possession must include an element of scienter, "some knowledge on the part of the defendant, more than just that he owned the premises or exercised dominion and

control over the premises." (Verbatim Report of Proceedings (RP) III-42) The trial court refused so to instruct the jury, informing counsel that, "you may have your exception." (RP III-48) Defense counsel also requested that the jury be instructed that the burden to prove every element of the crime is always on the state, citing Mullaney v. Wilbur, 421 U.S. 684 (1975) and In re Winship, 397 U.S. 358 (1970). (Defendant's Jury Instruction No. 4, Clerk's Papers (CP) 47)

The court instructed the jury that the crime of possession consisted of two elements: (1) unlawful possession (2) in King County. (Court's Instruction No. 6, CP 13) The court gave Defendant's Instruction No. 4, that the burden never shifts to the defendant. (CP 11) The trial court also instructed the jury on the defense of "unwitting possession":

> "Unwitting possession" means actual or constructive possession without knowledge or awareness of that possession and is a complete defense to the charge of unlawful possession of drugs as alleged in the information. If the evidence is sufficient to raise a reasonable doubt as to whether the defendant's possession, if any, was unwitting or without his knowledge, then you must acquit.

(CP 22)

Mr. Cleppe was convicted on all three counts and was sentenced to prison for a maximum term of five years. (CP 1) Mr. Cleppe appealed his conviction to the Washington Court of Appeals. Mr. Cleppe argued in the Court of Appeals that the trial court's failure to instruct the jury that knowledge was an element of the crime of possession, coupled with the defense of "unwitting possession", shifted the burden of proof of an element of the crime in violation of due process, citing Mullaney, supra,

and Winship, supra. (Brief of Appellant 51-52)

The Court of Appeals reversed Mr. Cleppe's conviction by unpublished opinion. See Appendices B and C. The Court of Appeals did not discuss the constitutional issue, but interpreted the crime of possession of controlled substances as including guilty knowledge as an essential element.

The State obtained review by the Washington Supreme Court of the decision of the Court of Appeals. Mr. Cleppe again argued that the defense of unwitting possession unconstitutionally shifted the burden of proof of an element of the offense to the defendant. (Supp. Brief of Respondent 40-47)

The Washington Supreme Court reversed the Court of Appeals, holding that guilty knowledge is not an essential element of the crime of possession of

controlled substances. (Appendix A) The Supreme Court's decision was based on the legislative history of the Act. The Court did not address the constitutional issue. The Court held that the jury was correctly instructed that unwitting possession is a defense which must be proven by the defendant:

> That unwitting possession has been allowed as an affirmative defense in simple possession cases may seem anomalous. If guilty knowledge or intent to possess are not elements of the crime, of what avail is it for the defendant to prove his possession was unwitting? Such a provision ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish his "possession" was unwitting, then he had no possession for which the law will convict. The burden of proof, however, is on the defendant. In Cleppe's case that issue was presented to the jury by an

> appropriate instruction. The jury found against him.

96 Wn.2d at 380-81. (Appendix A, page A-16)

Mr. Cleppe moved for reconsideration of the court's decision, again arguing that the defense of unwitting possession unconstitutionally shifted to the defendant the burden of proof of an element of the crime, citing Patterson v. New York, 432 U.S. 197 (1977), and Morrison v. California, 291 U.S. 82 (1934). (Motion for Reconsideration 20-21) Mr. Cleppe also argued that imposition of criminal liability without any showing of culpability or moral fault deprives a defendant of due process of law. (Id. 21-24) The Washington Supreme Court denied Mr. Cleppe's motion for reconsideration without discussion. (Appendix D)

B. Facts Material To Consideration Of Questions Presented

In the early morning hours of May 4, 1977, Seattle police officers conducted a search pursuant to warrant at the tavern owned by defendant Gerald Cleppe in King County, Washington. (RP II 220) Police found two-tenths of a gram of cocaine in a desk drawer in the tavern office. Count I of the information against Mr. Cleppe charged him with possession of the cocaine found in the desk drawer.

Both Mr. Cleppe and the tavern bookkeeper used the desk from time to time. (RP II 225-26, 230) The office itself was used by all 54 employees of the tavern for emergency or private telephone calls. (RP II 146, 229)

Mr. Cleppe denied any knowledge of the existence of the cocaine. (RP II 231) Mr. Cleppe had been out of town for

two weeks prior to the search, and testified that he had not looked in that desk drawer for weeks. (RP II 251) The bookkeeper also denied any knowledge of the cocaine. (RP II 168)

REASONS FOR ALLOWING THE WRIT

1. THE COURT SHOULD GRANT THE WRIT IN ORDER TO DEFINE THE UNRESOLVED RELATIONSHIP BETWEEN TWO CONCEPTS CENTRAL TO THE CRIMINAL LAW: THE STATE'S POWER TO IMPOSE BURDENS OF PROOF ON THE DEFENDANT; AND, THE IMPOSITION OF CRIMINAL SANCTIONS WITHOUT PROOF OF A CULPABLE STATE OF MIND.

Two concepts fundamental to our criminal law converge in this case. One is the shift of burdens of proof to the defendant, explored recently by this Court in Winship, Mullaney, and Patterson. The other concept is imposition of criminal liability without a mental element or mens rea, a problem of more ancient vintage. Both concepts strike at the philosophical and moral

foundations of our criminal law. Yet, the limitations of the Due Process Clause on either of these concepts are largely unexplored.

This case squarely confronts the due process implications of not one but both concepts. The State of Washington has imposed on this defendant a five-year prison sentence without proof of any mental element. Simultaneously, the State has imposed on the defendant the burden of disproving the only mental element important to the crime. The combination of these two fundamental concepts heightens the importance of an authoritative ruling by this Court on the implications of the Due Process Clause for these two important problem areas.

The State is not free to tamper indiscriminately with the ancient requirement of a culpable state of mind. If the State deems the defendant's state of mind

so significant that it makes the difference between guilt and innocence, the State cannot constitutionally shift to the defendant the burden of proving the mental state.

This Court explored the state's power to impose burdens of proof on the defendant in In re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977). Patterson made clear that, "there are obviously constitutional limits beyond which the States may not go" in shifting burdens of proof to the defendant. 432 U.S. at 210. The Court left these constitutional limits for determination in a later case.

The New York murder statute upheld in Patterson created the affirmative defense of extreme emotional disturbance. The State was required to prove the mental element, intent to kill, and

the defendant was required to prove the "substantially expanded" affirmative defense, a burden never traditionally imposed upon the State. 432 U.S. 205, 207.

The Washington possession statute is defective because it imposes criminal liability on the defendant without any mental element, and shifts to the defendant a burden of proof traditionally borne by the prosecution, i.e., the defendant's state of mind. Washington has created the very statutory scheme about which the Patterson dissent warned. 432 U.S. at 224 n. 8 and 9.

Guilty knowledge or intent is traditionally regarded as the sine qua non of criminal responsibility. "The ancient requirement of a culpable state of mind . . . is no provincial or transient notion." Morissette v. United States, 342 U.S. 240, 250 (1951). And the Court

more recently observed that, "intent generally remains an indispensable element of a criminal offense." United States v. United States Gypsum Company, 438 U.S. 422, 437 (1978).

No mental state need be proven for "public welfare offenses", see generally Morissette, 342 U.S. at 252-60, because the knowledge is irrelevant for such an offense. United States v. Balint, 258 U.S. 250, 252 (1922). Washington's possession statute is not a public welfare offense. Washington deems guilty knowledge so important that if the defendant can prove that the defendant lacked guilty knowledge, "then he had no possession for which the law will convict." 96 Wn.2d at 381 (Appendix A, page A-17)

This Court should grant the writ of certiorari to answer the question left unresolved by Patterson, i.e., the "constitutional limits beyond which the

States may not go" in shifting the burden of proof to the defendant. Patterson, 432 U.S. at 210. The Court should also grant the writ to define the constitutional dimensions of the requirement of a mental element in any criminal offense.

Defendant Gerald Cleppe urges the Court to adopt one of two alternative approaches in this case. The first alternative is procedural, to elaborate upon the scope of permissible burden-shifting in the tradition of Winship, Mullaney, and Patterson. The Court should hold that a state cannot impose on the defendant the burden of disproving the only mental state relevant to the offense. A culpable mental state has always been a hallmark of criminal responsibility. The modern trend toward requiring mental culpability for any criminal offense is best exemplified in

the Model Penal Code § 202(1) (Proposed Official Draft 1962).

Alternatively, defendant Cleppe urges the Court to adopt a substantive approach to the constitutional significance of the mental element of a criminal offense. Defendant urges this Court to hold that the State cannot deprive a person of liberty without proving a culpable state of mind. Our society has always regarded liberty as "an interest of transcending value." Winship, 397 U.S. at 364. The State should not be permitted to deprive a person of this most important of all constitutional rights unless the person is in some way mentally culpable. Model Penal Code § 2.05, Comment 1 (Tent. Draft No. 4, 1955); G. Williams, Criminal Law § 89 (2d ed. 1961); Hart, The Aims of the Criminal Law, 23 Law and Contemp. Prob. 401, 422 (1958); Jeffries & Stephan, Defenses,

Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1373 (1979); Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 150; Perkins, The Civil Offense, 100 U. Pa. L. Rev. 832, 846 (1952).

Prior decisions of this Court suggest that this Court has tolerated criminal liability without mental culpability only where the penalty is "relatively small, and conviction does no grave damage to an offender's reputation." Morissette, 342 U.S. at 256. See Packer, supra, 1962 Sup. Ct. Rev. at 112-114; Jeffries & Stephan, 88 Yale L. J. at 1374-75. The Court has also held that potential imprisonment triggers a defendant's right to counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972) (any imprisonment), and right to trial by jury, Duncan v. Louisiana, 391 U.S. 145 (1968) (imprisonment of six months or more).

Potential imprisonment should also trigger the requirement of mental culpability.

In summary, this case turns upon the relationship between two fundamental concepts in our criminal law, i.e., shifting the burden of proof to the defendant and the requirement of a culpable mental state. The Court should grant the writ in order to address authoritatively the ramifications of the Due Process Clause upon these two concepts.

2. THE COURT SHOULD ALLOW THE WRIT BECAUSE THE DECISION OF THE SUPREME COURT OF WASHINGTON CONFLICTS WITH THIS COURT'S DECISION IN MORRISON V. CALIFORNIA, 291 U.S. 82 (1934).

Morrison v. California, 291 U.S. 82 (1934), like Patterson, dealt with due process limitations upon the State's ability to shift the burden of proof to the defendant. Writing for the Court, Mr. Justice Cardozo held that the burden of proof could be shifted to the defendant only when "the State shall have

proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation." 291 U.S. at 88-89. The statute at issue in Morrison was struck down because the fact proven did not convey to the defendant "a warning signal according to the teachings of experience . . . [or] at least a sinister significance." 291 U.S. at 90.

The Washington Uniform Controlled Substances Act runs afoul of the due process limitation described in Morrison. All the defendant did was to own a tavern where a small amount of cocaine was found. The State cannot point to any fact or circumstance which might have warned the defendant that the cocaine was in a desk drawer in the tavern. The State failed to prove "enough to make it just for the defendant to be required to repel what has been proved with excuse or

explanation." Morrison, 291 U.S. at 88-89.

This Court should allow the writ and remedy the conflict between the decision of the Washington Supreme Court and the Morrison case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Supreme Court of Washington.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON, Petitioner, v. GERALD PAUL CLEPPE, Respondent.	CONSOLIDATED No. 47310-2
THE STATE OF WASHINGTON, Petitioner, v. VELMA J. SYKES, Respondent.	EN BANC Filed OCT 29 1981

In these cases, consolidated on appeal, Gerald P. Cleppe was tried by jury and Velma Sykes by the court. Both were convicted of possession of a controlled substance proscribed by RCW

69.50.401(c), now RCW 69.50.401(d).[1]

On appeal, the Court of Appeals, Division One, reversed Cleppe's conviction on the ground that possession of a controlled substance is a crime mala in se requiring proof of "guilty knowledge" for conviction, which proof was lacking. In the case of Sykes, the matter was remanded to the trial court for a finding of fact as to whether the defendant had "guilty knowledge" of the presence or character of the controlled substance which she was convicted of possessing. Both opinions of the Court of Appeals are unpublished. We granted the State's petition for discretionary review and in

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[1]As amended by Laws of 1979, ch. 67, § 1, new subsection (d) reads in part: "(d) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter."

both cases we reverse the Court of Appeals.

We are concerned here with two issues. One, confined to Cleppe's case, is whether an unnamed police informant must be disclosed. The other issue, common to both cases, is whether "intent" of "guilty knowledge" is an element of the crime of possession of a controlled substance. Neither is specifically made so by this state's statute, RCW 69.50.401(c).

May 4, 1977, Seattle police executed search warrants covering the Playhouse Tavern and a 19th Avenue N.E. house, both owned by Cleppe. Probable cause for the warrants was established by an affidavit based upon information supplied the police by two unnamed informants, A and B. The search at the tavern turned up a miniscule amount of cocaine, as the basis for count 1. At the 19th Avenue residence a quantity of marijuana and several

amphetamine pills were found, as the bases for counts 2 and 3.

Cleppe was charged with three counts of possession of a controlled substance and subsequently convicted on all counts. At trial, he excepted to the court's refusal to include "knowledge" as an element of the crime charged and offered a curative instruction. The court did, however, instruct that if Cleppe's possession was unwitting, he should be acquitted.

A major question presented to the jury was that of constructive possession. Cleppe asserted the marijuana and amphetamine pills belonged to his girlfriend who rented his 19th Avenue house. In connection with this assertion, Cleppe sought disclosure of the identity of informant B. He contended B's testimony would place ownership of the controlled

substance found at the 19th Avenue residence in his girlfriend and, thus, negate constructive possession in him. Cleppe denied any knowledge or ownership of the cocaine.

The companion case on appeal arises from the November 30, 1978, execution by Seattle police of search warrants covering two apartments, only one of which is here concerned. There the police found Velma Sykes and in a bedroom her two sleeping children. In a second bedroom a quantity of marijuana was discovered in matchboxes stacked on a nightstand. In the closet there was wearing apparel for both a man and a woman, a man's plaid sport jacket with 100 Valium tablets in a pocket, and additional matchboxes of marijuana in a sack on the floor.

Sykes was charged with possession of a controlled substance (marijuana) with

intent to manufacture and deliver under RCW 69.50.401(a). Trial was to the court.

At trial, the State relied upon constructive possession to convict, which was the main issue in the case. A major question was whether at the time of execution of the search warrant Sykes was living in the apartment where she was found. It is undisputed that she had in the past resided there with her boyfriend. He was living in the apartment though not present at the time of the search and at trial he testified the drugs were his.

The trial court resolved the issue of construction possession against Sykes. While she had been charged with possession of a controlled substance with intent to deliver, the State did not prove the element of intent. The court found her guilty only of the lesser

included offense of simple possession of a controlled substance.

Sykes challenges as improper the way in which the findings of fact and conclusions of law were entered in her case. Because of that impropriety she asks that the findings not be regarded as verities, though she makes no specific objection to any finding in the Court of Appeals or here. A general assignment of error was made that the court's findings of fact were insufficient to support a judgment of guilty of possession of a controlled substance.

We have carefully reviewed the record. We are satisfied that substantial evidence supports the trial court's finding that Sykes had dominion and control over the premises where marijuana was found and, thus, was in constructive possession of it. The trial court made no finding that she was aware of the

presence of marijuana in the apartment or that she had the intent to possess it. That is the basis of her appeal.

Both Cleppe and Sykes contend that guilty knowledge of or intent to possess a controlled substance is an essential element of the crime of simple possession. That element was not proved by the prosecution in either of these cases. Because of that omission, Division One of the Court of Appeals reversed in the one instance and remanded for a further finding in the other.

The Court of Appeals is divided on the matter of guilty knowledge or intent to possess. Division One holds that simple possession of a controlled substance is a crime mala in se and that "guilty knowledge" is a necessary element of the crime. See State v. Hennings, 3 Wn. App. 483, 475 P.2d 926 (1970); State v. Smith, 17 Wn. App. 231, 562 P.2d 659 (1977);

State v. Weaver, 24 Wn. App. 83, 600 P.2d 598 (1979). Division Three, on the other hand, has declined to follow Division One and holds that after establishing the nature of the substance and jurisdiction, possession alone, actual or constructive, is the sole element to be proved to convict of the crime of possession of a controlled substance under RCW 69.50.401(c). See State v. Sainz, 23 Wn. App. 532, 596 P.2d 1090 (1979) and State v. Hartzog, 26 Wn. App. 576, 615 P.2d 480 (1980).

This court's cases decided under the prior statute, the Uniform Narcotic Drug Act, rather uniformly held that neither "intent" nor "guilty knowledge" was a required element of the crime of simple possession of a narcotic drug. See State v. Henker, 50 Wn.2d 809, 314 P.2d 645 (1957); State v. Boggs, 57 Wn.2d 484, 358 P.2d 124 (1961). The reason, as set

forth in Henker at page 812, is that "[w]hether intent or guilty knowledge is to be made an essential element of this crime is basically a matter to be determined by the legislature." The court notes that a precursor statute[2] contained the words "with intent," which words had been omitted from the current statute, leading conclusively to the review that "[h]ad the legislature intended to retain guilty knowledge or intent as an element of the crime of possession, it would have spelled it out as it did in the previous statute." We are similarly compelled to that view in the cases before us.

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[2]The prior narcotics act, Laws of 1923, ch. 47, § 3, p. 134, provided: "It shall be unlawful for any person to sell, furnish, or dispose of, or have in his possession with intent to sell, furnish, or dispose of any narcotic drug or drugs, except upon the written and signed prescription of a physician regularly licensed to practice medicine and surgery . . ."

The statute concerned in Henker, the predecessor to the current drug statute, read in part:

> It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug . . .

(Italics ours.) RCW 69.33.230. This statute was repealed in 1971, and replaced by RCW 69.50, the Uniform Controlled Substances Act.

RCW 69.50.401(a) and (c) were amended in 1973 to read:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> . . .
>
> (c) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional

> practice, or except as otherwise authorized by this chapter.

(Italics ours.)

We note that our legislature did not adopt the language of subsection 401(c) of the uniform act:

> (c) Except as provided in Section 409, it is unlawful or any person knowingly or intentionally to possess a controlled substance . . .

(Italics ours.) 9 U.L.A. 259 (Master ed. 1979). Our opinion turns on the clear manifestation of legislative intent in omitting the key words "knowingly" and "intentionally".

In reviewing the legislative history of this state's version of the Uniform Controlled Substances Act, RCW 69.50, we find it first set out in Senate Bill 146, 42d Legislature (1971) (SB 146). Introduced in January 1971, SB 146 followed the uniform act and the words "knowingly

or intentionally" were included in subsection 401(c).

After first reading, it was referred to committee where it was replaced by Substitute Senate Bill 146 (SSB 146). The words "knowingly or intentionally" were omitted from subsection 401(c) of the substitute bill. A second Substitute Senate Bill 146 (2d SSB 146) replaced SSB 146. It, too, omitted the words "knowingly or intentionally" from subsection 401(c).

Following passage of 2d SSB 146 by the Senate, it was sent to the House, and though other changes were made in the bill the House continued to omit the words "knowingly or intentionally" from the crime of possession of a controlled substance in subsection 401(c).

In State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979), we held that

"guilty knowledge", defined as an understanding of the identity of the product being delivered, was an intrinsic element of the crime of delivery of a controlled substance under subsection 401(a). To convict under that subsection, the State must prove that element beyond a reasonable doubt. Boyer has been read in conflicting fashion by the Court of Appeals in Weaver and Hartzog.

In Hartzog, Division Three read Boyer to mean that delivery of a controlled substance was to be regarded as a crime mala in se when "guilty knowledge" was held by this court to be an intrinsic element of the offense, though mala in se is not discussed in the case. Division Three, however, did not extend the mala in se characterization to the crime of simple possession of a controlled substance. That offense was held to be mala

prohibita because possession is proscribed in a separate subsection, and does not provide that guilty knowledge or intent are elements of the crime. Division Three harmonizes Boyer by characterizing subsection 401(a) crimes as mala in se and bases its construction of subsection (c) as a mala prohibita crime on Henker reasoning. That is, if the legislature had intended guilty knowledge or intent to be an element of the crime of simple possession of a controlled substance it would have put the requirement in the act.

We need not discuss further mala in se and mala prohibita. Suffice to say that the legislature in responding to the problem of drug abuse, one of the major social evils of our time, adopted the Uniform Controlled Substances Act. The act, as introduced in the Senate, made "knowingly" and "intentionally" elements

of the misdemeanor of simple possession of a controlled substance. As the legislature worked its will on the bill, the words "knowingly or intentionally" were deleted from subsection 401(c) and the crime was upgraded from a misdemeanor to a felony. No change was made in subsection 401(a), as introduced.

This conflict, if such it be, must be corrected by the legislature, not the court. The legislature was met twice since our decision in Boyer that guilty knowledge is an implicit element of the subsection 401(a) crime of delivery, and it has not revised subsection 401(a). As to subsection 401(c), the legislative intent is clear.

That unwitting possession has been allowed as an affirmative defense in simple possession cases may seem anomalous. If guilty knowledge or intent to possess are not elements of the crime, of

what avail is it for the defendant to prove his possession was unwitting? Such a provision ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish his "possession" was unwitting, then he had no possession for which the law will convict. The burden of proof, however, is on the defendant. In Cleppe's case, that issue was presented to the jury by an appropriate instruction. The jury found against him.

Prior to trial, Cleppe moved for disclosure of the identities of both informants. Before this court, he limits his request and assignment of error to informant B. A separate hearing was held before a judge other than the one who presided at Cleppe's trial. Since constructive possession would be a vital

issue at trial, Cleppe sought the informant's identity with a view to obtaining testimony that would bear on the issue of ownership of the drugs. The basis for this request was the probable cause affidavit, according to which informant B claimed to have observed within the past 24 hours in the 19th Avenue house Cleppe's girlfriend use heroin, and heard her state that additional heroin belonged to her and that "they" had cocaine for sale.

The hearing judge denied Cleppe's motion for disclosure of its finding that the informant was not a necessary and material witness. The Court of Appeals affirmed this ruling.

Generally, the State need not disclose the identity of an informant furnishing information establishing probable cause for the issuance of warrants. RCW 5.60.060(5); CrR 4.7(f)(2); State v.

Harris, 91 Wn.2d 145, 588 P.2d 720 (1978). The State's privilege of non-disclosure, however, must yield where such disclosure is relevant and helpful to an accused and essential to a fair trial. Roviaro v. United States, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957).

The exception is not susceptible to hard and fast rules. Its proper use entails balancing the public interest in continuing the flow of information for the informant against the accused's right to prepare a defense. How the balance falls depends on the circumstances of each case considering the type of crime charged, possible defenses, possible significance of the informer's testimony and any other relevant facts. Roviaro, at 62.

If the trial court deems that the informant's testimony may be relevant and

helpful to the defense and essential to a fair trial, disclosure may be required. "The preferred method for making this determination . . . is for the court to hold an in camera session at which the judge hears the informer's testimony and applies the Roviaro standard." Harris, at 150. No hearing is necessary, however, if the accused's reasons for seeking the informant's testimony are only speculative, though the hearing judge should take into consideration the difficulty of explaining in a vacuum why the testimony is crucial. See Comment, Defendant's Right to a Confidential Informant's Identity, 40 La. L. Rev. 147, 168 (1979). Doubt should be resolved in favor of holding the in camera hearing.

This case was heard in the trial court before State v. Harris, supra or State v. Allen, 27 Wn. App. 41, 615 P.2d 526 (1980) were decided. In Allen, the

Court of Appeals reversed and remanded for a Roviaro type hearing in an appropriate case.

Cleppe is also an appropriate case for such a hearing. Informant B told the affiant he had (1) been in the 19th Avenue house, (2) observed Cleppe's girlfriend use heroin, (3) observed an additional quantity of heroin which the girlfriend said belonged to her, and (4) she had said "they" had cocaine for sale. See State v. Allen, supra.

There is evidence that the 19th Avenue house was occupied by more than one person, both Cleppe and his girlfriend. See State v. Allen, supra. There is also evidence that Cleppe rented the house to his girlfriend and that he lived elsewhere.

The pivotal question at trial regarding the controlled substances found

at the 19th Avenue address involved constructive possession. Informant B may have been able to testify regarding whether the nature of the girlfriend's possession of the drugs was exclusive. His testimony could possibly aid in negating the State's case of constructive possession by Cleppe. Therefore, Cleppe has made a showing of, and such disclosure as he seeks may be necessary for a fair trial, necessitating a Roviaro type hearing in his case. Thus the Court of Appeals is reversed, and the case is remanded for a hearing under the auspices of CrR 4.7(h)(6). Should the trial court determine after the in camera hearing that informant B's testimony would be relevant or helpful to Cleppe's defense and is required for a fair trial, then a new trial should be granted as to counts 2 and 3. If the court determines to the contrary, the judgment on the jury's

verdict is reinstated. In any event as to count 1, the judgment in reinstated.

As to Sykes, the Court of Appeals is reversed and the judgment of the trial court reinstated.

/s/ Hicks, J.

WE CONCUR:

/s/ Brachtenbach, C.J.

/s/ Rosellini, J.

/s/ Stafford, J.

/s/ Utter, J.

/s/ Dolliver, J.

/s/ Williams, J.

/s/ Dimmick, J.

Thompson, J.P.T.

APPENDIX B

FILE
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON-
DIVISION 1
DATE: July 16, 1979

/s/ Keith M. Callow
CHIEF JUDGE

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GERALD P. CLEPPE, Appellant.	No. 6324-I DIVISION ONE FILED JUL 16 1979

FARRIS, J.--Gerald Paul Cleppe appeals his conviction of three counts of possession of controlled substances. RCW 69.50.401(c).

The charges against Cleppe arose out of the execution of search warrants on his tavern and a residence which he owned. The warrants were issued by

Seattle District Court Judge Bill Lewis. The State acknowledges the fact that the tavern is located outside the territorial jurisdiction of the district court.

Cleppe first assigns error to the trial court's refusal to instruct the jury that knowledge was an element of the crime of possession of a controlled substance.

Cleppe contends that possession of narcotics is a mala in se crime which must contain guilty knowledge as an essential element to be proved by the State unless the legislature expressly removes scienter from the offense. State v. Turner, 78 Wn.2d 276, 474 P.2d 91 (1970); State v. Smith, 17 Wn. App. 231, 562 P.2d 659 (1977); State v. Scriver, 20 Wn. App. 388, 580 P.2d 265 (1978). We agree.

RCW 69.50.401(c) declares the possession of controlled substances not lawfully obtained to be a criminal act

without regard to intent or knowledge. Where the crime involves moral turpitude, guilty knowledge will be deemed an essential element. State v. Turner, supra; State v. Smith, supra. Unlawful possession and sale of narcotic drugs is conduct involving moral turpitude. State v. Smith, supra; State v. Hennings, 3 Wn. App. 483, 475 P.2d 926 (1970). RCW 9A.08.010(1)(b) provides:

> (b) Knowledge. A person knows or acts knowingly or with knowledge when:
> (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) he has information which would lead a reasonable man in the same situation to believe the facts exist which facts are described by a statute defining an offense.

The instructions given failed to inform the jury of the requirement that Cleppe must "knowingly" possess the drugs as that term is defined in

RCW 9A.08.010(b). See State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979).

Upon retrial Cleppe's contention that it was error to instruct the jury that constructive possession occurs when there is dominion and control over the premises where the substance is located can be corrected by giving WPIC 50.03, 11 Wash. Prac. 281 (1977).

Cleppe also contends that the Seattle District court warrant which authorized the search of the tavern was invalid because the tavern was located outside the Court's district. Such a warrant for controlled substances, however, is specifically authorized by RCW 69.50.509. Moreover, RCW 3.20.120, relied on by Cleppe, applies only to class A counties. King County is a class AA county. RCW 36.13.010.

Cleppe contends that the officers exceeded the scope of their authority

under the search warrants when they seized his keys, used them in the search and entered them into evidence. Evidence not described in a warrant may be seized if it has a sufficient nexus with the crime under investigation and is observed in plain view. Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971); State v. Turner, 18 Wn. App. 727, 729, 571 P.2d 955 (1977). The keys were plainly visible in Cleppe's hand when the officers entered the tavern. Their seizure and use was not error. State v. Turner, supra.

Cleppe contends that it was error to refuse to compel disclosure of the identity of the informants. There is no basis in the record for an argument that the informant could aid the defense. Cleppe did not meet his burden to prove circumstances which require disclosure.

State v. Burleson, 18 Wn. App. 233, 566 P.2d 1277 (1977).

Cleppe sought the admission of an unstipulated polygraph at trial and in support of a pretrial motion to dismiss. He presented the testimony of an acknowledged expert who conducted the exam. The complete set of questions asked and the resulting charts were not entered into evidence.

The general rule, followed in this state, is that unstipulated polygraph exams are inadmissible. State v. Woo, 84 Wn.2d 472, 527 P.2d 271 (1974). Any reconsideration of this rule requires a record which permits an adequate review of the subject. State v. Woo, supra. Without a complete set of questions asked and the resulting charts, such review is precluded. State v. Pleasant, 21 Wn. App. 177, 583 P.2d 680 (1978).

Cleppe's remaining assignments of error concern the failure of the police officers to preserve items of evidence and the refusal of the trial court to allow surrebuttal testimony. They are without merit. State v. Haynes, 16 Wn. App. 778, 559 P.2d 583 (1977). State v. Bowen, 12 Wn. App. 604, 531 P.2d 837 (1975).

Reversed.

/s/ Farris, J.

WE CONCUR:

/s/ Ringold, J.

/s/ Williams, J.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

/s/ Keith M. Callow
CHIEF JUDGE

APPENDIX C

F I L E
IN THE CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON-DIVISION-I
DATE June 30, 1980
/s/ Keith M. Callow
CHIEF JUDGE

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	NO. 6324-3-I
v.	)	Division One
GERALD PAUL CLEPPE, Appellant.	)	FILED JUN 30 1980

CALLOW, C.J.--State v. Cleppe, No. 6324-I (Wash. Ct. App., Div. I, unpublished opinion filed July 16, 1979), reversed the conviction of Gerald Paul Cleppe of three counts of possession of controlled substances, RCW 69.50.401(d), because of the trial court's refusal to

instruct the jury that guilty knowledge as defined in RCW 9A.08.010(1)(b) is an element of the crime of possession of a controlled substance. We subsequently granted the State's motion for reconsideration, which raises the following two issues: (1) Is guilty knowledge an element of the crime of possession of a controlled substance, RCW 69.50.401(d)? (2) If State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979), is controlling on the first issue, should it be applied retroactively to cases tried prior to its having been filed? We uphold the previous opinion filed in this cause. We reverse and remand for a new trial.

The first issue raised by the State is whether guilty knowledge is an element of the crime of possession of a controlled substance, RCW 69.50.401(d). The State argues that Washington case law at the time of the defendant's trial held

that guilty knowledge was not an element of the crime of possession of a controlled substance, citing, e.g., State v. Perry, 10 Wn. App. 159, 516 P.2d 1104 (1973); State v. Edwards, 9 Wn. App. 688, 514 P.2d 192 (1973); that it still should not be an element, State v. Wilson, 20 Wn. App. 592, 581 P.2d 592 (1978); and that State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979), is distinguishable because it involved only the crime of delivery of a controlled substance, RCW 69.50.401(a). The State does acknowledge that making unwitting possession a defense is unnecessarily confusing, while specifically requiring knowledge as an element will likely lead to the same results in a simpler fashion.

State v. Weaver, 24 Wn. App. 83, 600 P.2d 598 (1979), is dispositive of this issue. As noted therein, prior case law involving the Uniform Narcotic Drug

Act (UNDA), Laws of 1959, ch. 27, p. 197, held that the legislature's omission from the UNDA of the words "with intent" contained in the previous narcotics act[1] indicated a legislative purpose to make mere possession a crime. State v. Weaver, supra at 87 (citing State v. Boggs, 57 Wn.2d 484, 485-86, 358 P.2d 124 (1961); State v. Henker, 50 Wn.2d 809, 812, 314 P.2d 645 (1957)). Although this rule was criticized, State v. Hennings, 3 Wn. App. 483, 488-89, 475 P.2d 926 (1970), cases construing the UNDA were

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[1]Laws of 1923, ch. 47, §3, p. 143 provided:

"It shall be unlawful for any person to sell, furnish, or dispose of, or have in his possession with intent to sell, furnish or dispose of any narcotic drug or drugs, except upon the written and signed prescription of a physician..." In contrast, Laws of 1959, ch. 27 §69.33.230, p. 207 declared it unlawful "for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter."

cited as controlling authority in cases involving the newly enacted Uniform Controlled Substances Act, RCW ch. 69.50[2], with the result that once the State had proved beyond a reasonable doubt that the defendant was in either actual or constructive possession of a narcotic drug, the burden was cast upon the defendant to show as a matter of defense that his possession was unwitting or without knowledge. E.g., State v. Edward, 9 Wn. App. 688, 690, 514 P.2d 192 (1973); State v. Singleton, 9 Wn. App. 327, 511 P.2d 1396 (1973). State v. Boyer, 91 Wn.2d 342,

---

[2]The enactment of the Uniform Controlled Substances Act in 1971 made it unlawful "for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." RCW 69.50.401(a). In addition, it was declared unlawful "for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter." RCW 69.50.401(d).

588 P.2d 1151 (1979), a case involving the crime of delivery of a controlled substance, subsequently stated that the intent language of RCW 69.50.401(a) does not resolve the issue whether guilty knowledge of the identity of the thing possessed is an element of the crime. Boyer, by holding that guilty knowledge must be proved beyond a reasonable doubt, thus discredited the rationale of the cases construing the UNDA. In accordance with the reasoning of Boyer and State v. Hennings, supra, that a statute setting forth a malum in se crime will be construed to require guilty knowledge in the absence of express legislative language to the contrary, Weaver holds that guilty knowledge of the drug's existence is an element of the crime of possessing a controlled substance, RCW 69.50.401(d). We adhere to our decision in Weaver.

The second issue raised by the State is whether State v. Boyer, supra, should be applied retroactively to cases tried prior to its having been filed. The State contends and argues that the holding of State v. Boyer, supra, should not be applied retroactively to cases previously tried. We decline to reach this issue because it is raised for the first time in the State's motion for reconsideration. See Malo v. Anderson, 76 Wn.2d 1, 4, 454 P.2d 828 (1969). In any case, the judicial determination of a statute's meaning does not involve the question of retroactivity. Johnson v. Morris, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976).

We uphold the previously filed opinion in this case reversing and remanding for a new trial.

/s/ Callow, C.J.
CALLOW, C.J.

WE CONCUR:

/s/ Anderson, J. /s/ Durham-Divelbiss, J.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

/s/ Keith M. Callow
CHIEF JUDGE

APPENDIX D

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Petitioner,

v.

GERALD PAUL CLEPPE,

Respondent.

Nos. 47310-2, 47334-0

THE STATE OF WASHINGTON,

Petitioner,

v.

VELMA J. SYKES,

Respondent.

ORDER DENYING MOTIONS FOR RECONSIDERATION

The Court having unanimously decided that the respondents' motions for reconsideration should be denied,

It is ordered that the motions be and they hereby are denied.

Dated this 17th day of December, 1981.

/s/ Robert F. Brachtenbach
Chief Justice

Opposition

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS
CLERK

81-1546

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GERALD PAUL CLEPPE, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

NORM MALENG
King County Prosecuting Attorney

J. ROBIN HUNT
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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review a state court's construction of a state statute from which the state legislature purposefully omitted "knowledge" and "intent" as elements of the crime of unlawful possession of controlled substances?

2. Does the due process clause of the Constitution require the state in a criminal prosecution to prove the absence of an affirmative defense?

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OPINION BELOW

The opinion of the Supreme Court of Washington in State v. Cleppe is reported at 96 Wash. 2d 373, 635 P.2d 435 (1981). The opinion is reproduced at Appendix A of Cleppe's petition.

JURISDICTION

Petitioner Cleppe invokes jurisdiction pursuant to 28 USC 1257(3), Supreme Court review of a final judgment of the highest court of a state which allegedly is repugnant to the Constitution. The Washington Supreme Court opinion in question interprets a state statute based upon state legislative history in a manner which is not repugnant to the Constitution. This court should decline to assert jurisdiction in this case.

STATUTORY PROVISION INVOLVED

Wash. Rev. Code 69.50.401(c), now codified as § 69.50.401(d):

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined for more than $10,000, or both, except as provided for in subsection (e) of this section.

STATEMENT OF THE CASE

On May 4, 1977, Seattle police officers executed search warrants on defendant Cleppe's home and business, the Playhouse Tavern. They found cocaine in a desk drawer of the business office of the tavern. In Cleppe's residence they found growing marijuana plants, marijuana in a safe and amphetamines. The defendant denied living at the residence and

denied knowledge of the cocaine in the desk drawer.

Cleppe was charged with unlawful possession of controlled substances under Wash. Rev. Code 69.50.401(c), now codified as 69.50.401(d). This statute makes no mention of "knowledge" as an element of this crime. In accordance with the language of the statute, the jury was instructed that "knowledge" is not an element of the crime. They were instructed, however, that "unwitting possession" is an affirmative defense to the charge. Cleppe was convicted as charged.

Ultimately the highest state court, the Supreme Court of the State of Washington, accepted review. The State Supreme Court examined the legislative history behind Wash. Rev. Code 69.50.401(c) and held that neither "intent" nor "guilty knowledge" are

elements of the crime of possessing a controlled substance. It is from this decision, reported as State v. Cleppe, 96 Wash. 2d 373, 635 P.2d 435 (1981), that defendant brings his Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 17.1 sets forth three "Considerations Governing Review on Certiorari." This case meets none of them. Petitioner Cleppe is requesting that this Court review and reinterpret a state statute fully and correctly construed by the highest court of the State of Washington. The Washington Supreme Court's construction of the Washington controlled substances statute neither conflicts with a decision of another state court of last resort nor involves an important question of federal

law which should be settled by this Court. Rule 17.1(b) and (c).

1. This Supreme Court Lacks Authority To Construe State Statutes.

Cleppe invites this Court to do what the courts of Washington have refused to do and what this Supreme Court lacks the authority to do: rewrite the state controlled substances statute.

It is the responsibility of the legislature, not the court, to define crimes. Morissette v. United States, 342 U.S. 246, 263 (1951). The Washington State Supreme Court properly left this matter to the state legislature. See State v. Cleppe, 96 Wash. 2d 373, 625 P.2d 435 (1981). This Court should do the same.

This Court lacks authority to construe state statutes. United States v. Thirty-seven Photographs, 402 U.S.

363, (1971). Where, as in the instant case, state courts have construed state statutes in such away as to avoid constitutional questions, ordinarily the Court accepts the construction given by the local court and will not substitute its own judgment for that of the highest court of the state. See Baggett v. Bullitt, 377 U.S. 360 (1964); Garner v. Louisiana, 368 U.S. 157 (1961).

The construction given by the local court in this case is as follows:

> a precursor statute contained the words "with intent," which words had been omitted from the current statute, leading conclusively to the view that "[h]ad the legislature intended to retain guilty knowledge or intent as an element of the crime of possession, it would have spelled it out as it did in the previous statute." We are similarly compelled to that view in the cases before us....
>
> This statute was repealed in 1971, and replaced by RCW 69.50, the Uniform Controlled Substances Act.
>
> RCW 69.50.401(1) and (c) were amended in 1973 to read:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> ...
>
> (c) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter.
>
> [Italics omitted.]
>
> We note that our legislature did not adopt the language of subsection 401(c) of the uniform act:
>
> (c) Except as provided in Section 409, it is unlawful for any person knowingly or intentionally to possess a controlled substance. . .
>
> (Italics ours.) 9 U.L.A. 259 (Master ed. 1979). Our opinion turns on the clear manifestation of legislative intent in omitting the key words "knowingly" and "intentionally".

Cleppe, 96 Wash. 2d at 378-9.

The state court carefully reviewed the legislative history of Washington's

version of the Uniform Controlled Substance Act and found that:

> As the legislature worked its will on the bill, the words "knowingly or intentionally" were deleted from subsection 401(c) and the crime was upgraded from a misdemeanor to a felony. No change was made in subsection 401(a), as introduced.
>
> This conflict, if such it be, must be corrected by the legislature, not the court. The legislature has met twice since our decision in Boyer that guilty knowledge is an implicit element of the subsection 401(a) crime of delivery, and it has not revised subsection 401(a). As to subsection 401(c), the legislative intent is clear.

Cleppe, 96 Wash. 2d at 380.

The Washington legislature expressly excluded "intent" or "knowledge" as an element of simple possession of a controlled substance. Whether scienter is a necessary element of a statutory crime is a question of legislative intent. United States v. Balint, 258 U.S. 250, 252 (1922)(statute prohibiting sale of narcotic drugs does not require

proof that seller knew of their character). See also United States v. Behrman, 258 U.S. 280, 288 (1922)(intent or knowledge need not be elements of a statutory regulation making it unlawful to dispense or possess narcotic drugs except by prescription for proper medical purposes); The legislation in question does not violate due process and should not be rewritten by this court.

2. The State Court's Statutory Construction Does Not Shift To Defendant The Burden Of Proving An Element Of The Crime Or Deny Due Process Of Law.

Recently in Engle v. Isaac, ____ U.S. ____, 31 CrL 3001, 50 L. W. 4376 (April 5, 1982) this Court implicitly rejected defendant's claim that by creating an affirmative defense, the state assumed the responsibility of proving the absence of that defense beyond a reasonable doubt. See 31 CrL 3005.

In prohibiting possession of controlled substances without a prescription, the Washington legislature sought to control "one of the major social evils of our time." Cleppe, 96 Wash. 2d at 380.

The Washington Supreme Court below noted, however, that a bona fide claim of unwitting possession is an affirmative defense to a charge of simple possession of a controlled substance, even though guilty knowledge or intent to possess are not elements of the crime:

> Such a provision ameliorates the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish his "possession" was unwitting, then he had no possession for which the law will convict. The burden of proof, however, is on the defendant. In Cleppe's case, that issue was presented to the jury by an appropriate instruction. The jury found against him.

Cleppe, 96 Wash. 2d at 380-1.

Construction of the statute does not conflict with Morrison v. California, 291 U.S. 82 (1934) in which this Supreme Court held that the burden of proof can "within limits of reason and fairness" shift in criminal prosecutions from the state to the defendant:

> The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Morrison, 291 U.S. at 88-89.

It is well settled that while the burden is on the state to prove every element of the crime, when an affirmative defense is asserted, the burden shifts to the defendant. In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Leland v. Oregon, 343 U.S.

790 (1952). In the case at bar, the State proved that controlled substances were found at defendant's residence and business. It is "just" that he "be required to repel what has been proved with excuse or explanation." Morrison, supra.

Cleppe's claim is merely a variation of that addressed in Engle v. Isaac. It is unnecessary for this court to exercise its discretion in this case in order to reiterate the same principles so recently and clearly enunciated.

Neither is this the case in which to explore the outer limits of Patterson v. New York, 432 U.S. 197 (1977). Patterson dealt with shifting to the defendant the burden of proof of an essential specified element of the offense. In contrast to Patterson, here "intent" or guilty knowledge" are simply not elements of the crime. The State

must prove only the statutorily defined elements of possession of a controlled substance. To the extent that a defendant's mental state is even relevant, a defendant may avoid culpability by showing that he unwittingly possessed the substance. Such an allocation of burdens does not shift to defendant the burden of proving any element of the crime.

CONCLUSION

Cleppe's conviction was based upon substantial evidence. The controlled substances were found not only in the desk of Cleppe's business, but in his residence as well. The jury's verdict was the natural result of careful fact finding and law application; as such it should remain undisturbed.

If the statute is judicially redrafted to make intent or guilty knowledge an element of the crime of mere

possession, then the State legislature's purpose will be subverted. The State proved each and every element of the offense as formulated by the legislature. Cleppe's affirmative defense of unwitting possession was simply not convincing to the jury. Cleppe received a fair trial. His conviction was fully and fairly reviewed by the state appellate courts. It would be unconsciousable to allow him now to transform his unsupportable affirmative defense into an element of the crime to be disproved by the State. The Washington legislature rejected such burden shifting when it specifically omitted "knowledge" or "intent" as elements of the crime of simple possession of controlled substance. See also, Engle v. Isaac, supra. This statute and the highest state court's interpretation violates no federal

constitutional provisions. They should remain untouched by this court.

The State of Washingon, therefore, respectfully requests that defendant's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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May 1982